UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EDWARD BOAKYE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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09 Civ. 8217

OPINION

A P P E A R A N C E S:

Pro Se

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49583-054
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Sweet, D.J.

Edward Boakye (the "Petitioner" or "Boakye") has moved to vacate, set aside or correct his sentence pursuant to Title 28, United States Code, Section 2255 (the "Section 2255 motion" or "Petition") because of ineffective assistance of counsel resulting from counsel's failure to advise Petitioner that Petitioner's deportation was an "automatic" consequence of a guilty plea, as opposed to merely a "possible" consequence. Upon the facts and conclusions set forth below, the Section 2255 motion is denied.

Prior Proceedings

On March 22, 2005, Petitioner was charged together with four codefendants in a three-count Superseding Indictment, S1 04 Cr. 1148. Count One charged Petitioner and three codefendants with conspiracy to import into the United States one kilogram and more of heroin, in violation of Title 21, United States Code, Section 963, from July 2004 through August 20, 2004. County Two charged Petitioner and three codefendants with conspiracy to distribute and possess with the intent to distribute one

kilogram and more of heroin, in violation of Title 21, United States Code, Section 846, from July 2004 through August 20, 2004. Count Three charged two codefendants, but not Petitioner, with conspiracy to conduct and attempt to conduct financial transactions designed to conceal and disguise the nature, location, source, ownership and control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, Section 1956(h), from about July 2004 through about August 2004.

On September 30, 2005, Petitioner pleaded guilty before Magistrate Judge Henry B. Pitman to Counts One and Two of Superseding Indictment S1 04 Cr. 1148, pursuant to a written plea agreement with the Government dated September 30, 2009.

The plea agreement provided, in part, that the Government would accept a guilty plea from Petitioner to Counts One and Two of the Superseding Indictment, and that in consideration of that plea, Petitioner would not be further prosecuted for (1) participating in a conspiracy to import one kilogram and more of heroin from in or about July 2004 up to and including on or about August 20, 2004, as charged in Count One, and (2) participating in a

conspiracy to distribute and possess with intent to distribute, one kilogram and more of heroin from in or about July 2004 up to and including on or about August 20, 2004, as charged in Count Two. The parties stipulated that Petitioner's sentencing range under the United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines") was 108 to 135 months' imprisonment. Because the minimum sentence allowed by statute for the offense to which Petitioner pleaded guilty was 120 months, however, the parties stipulated that Petitioner's sentencing guidelines range was 120 to 135 months.

During the plea proceeding on September 30, 2005, Magistrate Judge Pitman conducted a plea allocution that conformed with Rule 11 of the Federal Rules of Criminal Procedure in all respects. At the plea proceeding, Petitioner was represented by Harvey Fishbein, Esq. ("Fishbein") who had been appointed on April 26, 2005, to replace Petitioner's previously appointed counsel. (Declaration of Harvey Fishbein dated November 19, 2009 ("Fishbein Decl.") ¶ 1).

With respect to the Defendant's satisfaction with his counsel, the Court asked whether Petitioner was

"generally satisfied with Fishbein's representation" and "with the advice he has given," and the Petitioner answered "yes, your honor." (Plea Transcript dated September 30, 2005 at 7).

With respect to the immigration consequences of the guilty plea, the following colloquy took place:

THE COURT:	. . . Mr. Boa[ky]e, because a plea to a felony can also have immigration consequences for individuals who are not United States citizens, let me ask you, are you a United States citizen?
THE DEFENDANT:	No, your Honor.
THE COURT:	Okay. Do you understand that another possible consequence of your plea here is that you might be deported or removed from the United States, and you might be prohibited from every reentering the United States; do you understand that?
THE DEFENDANT:	Yes, your Honor.

In an Order dated October 24, 2005, Petitioner's guilty plea was accepted.

In a letter dated April 23, 2006, Petitioner wrote to Fishbein and asked that he "research the feasibility of a '5K2.0' proposal, Agreement To Voluntary

Deportation" and requested that he "prepare and file the appropriate motion concerning this before my sentencing date." (Fishbein Decl. ¶ 4 & Attachment (Emphasis in Original)). Fishbein did not make the requested motion because Petitioner's "plea agreement precluded a downward departure motion and because the recommended sentencing guidelines range in the plea agreement and the Presentence Report was already at the mandatory minimum of 120 months." (Fishbein Decl. ¶ 4).

Shortly thereafter, Fishbein met with Petitioner and Petitioner "demanded" that Fishbein make a motion to withdraw Petitioner's guilty plea on a number of grounds, none of which related to the immigration consequences of the plea. (Fishbein Decl. ¶5). Fishbein's disagreement with Petitioner regarding a motion to withdraw Petitioner's guilty plea led Fishbein to withdraw as counsel for Petitioner. (Fishbein Decl. ¶ 5). In an Order dated May 9, 2006, the Court approved the substitution of attorney Susan V. Tipograph, Esq. ("Tipograph") for Fishbein.

On November 6, 2006, Tipograph submitted a letter to this Court requesting "the lowest sentence the Court considers reasonable under the circumstances." The letter

specifically stated that "Mr. Boakye will most certainly be deported upon completion of any sentence. He will not contest any deportation and looks forward to returning to Ghana as quickly as possible." (Id.)

On November 13, 2006, the Court issued a Sentencing Opinion (the "Sentencing Opinion") stating that Petitioner would be sentenced to 120 months' imprisonment on Counts One and Two, to run concurrently, five years' supervised release, and a $200 special assessment, subject to modification at the sentencing proceedings schedule for that same day. At those sentencing proceedings, the Court sentenced the defendant as set forth in the Sentencing Opinion. Judgment was entered November 16, 2006.

On November 22, 2006, Petitioner, through counsel, filed a timely notice of appeal. Tipograph moved for permission to withdraw as counsel pursuant to Anders v. California, 386 U.S. 738, 744 (1967), and the Government moved for summary affirmance. In a Mandate issued June 3, 2008, the United States Court of Appeals for the Second Circuit granted both motions.

Petitioner filed the instant timely motion pursuant to Title 28, United States Code, Section 2255, on or about August 12, 2009 and it was marked fully submitted on November 24, 2009.

The Facts

The Petitioner was born in Ghana and has been a permanent resident of the United States since 1996. (United States Probation Department's Presentence Investigation Report ("PSR") ¶¶ 66, 68)). Pursuant to Title 8, United States Code, Section 1227(a)(2)(A)(iii), "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." An "aggravated felony" for purposes of determining immigration status includes an offense of "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B). In this case, Petitioner pleased guilty to a drug trafficking offense, and was thus deportable. The PSR specifically noted that Petitioner was subject to removal proceedings. (PSR ¶ 68).

The Applicable Standard

Petitioner has contended that he did not receive effective assistance of counsel because at his plea proceeding, both his counsel and the Court said, in effect, that Petitioner "might" be deported, instead of informing Petitioner that deportation would be "automatic" following his conviction. (Petitioner's Brief dated August 12, 2009 ("Pet. Br.") at 7-9).

A claim that defense counsel was ineffective in the context of a guilty plea is evaluated under the two-part standard set forth in Strickland v. Washington, 466 U.S. 668, 687-88, 693 (1984); Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). To prevail, Petitioner must (1) show that his counsel's representation fell below "an objective standard of reasonableness" under "prevailing professional norms"; and (2) "affirmatively prove prejudice." Strickland, 466 U.S. at 687-88, 693; accord Chang v. United States, 250 F.3d 79, 84 (2d Cir. 2001); Cullen v. United States, 194 F.3d 401, 403 (2d Cir. 1999). Only if both of these elements are satisfied can the Petitioner demonstrate that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687.

In the context of a claim of ineffective assistance of counsel premised on a Petitioner's lack of knowledge of the immigration consequences of his guilty plea, the Supreme Court has recently held that "constitutionally competent counsel [will advise a defendant] that his conviction . . .[makes] him subject to automatic deportation . . . [when] the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [his] conviction." Padilla v. Kentucky, No. 08-651, 2010 WL 1222274, at *3, *8 (U.S. Mar. 31, 2010). The Court in this decision did away with the distinction that existed in some circuits, including this one (see United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002)), between affirmative misrepresentations by counsel and the failure to provide correct advice on the immigration consequences of a guilty plea or conviction. Padilla, 2010 WL 1222274, at *9. ("[W]e agree that there is no relevant difference between an act of commission and an act of omission in this context." (internal citations and quotation marks omitted))

Even if the first prong of the Strickland test as applied by Padilla to immigration-related legal advice is met, a Petitioner still must satisfy the second prong of

the Strickland test by "affirmatively prov[ing] prejudice." Strickland, 466 U.S. at 693. See Padilla, 2010 WL 1222274, at *3 ("Whether [Petitioner] is entitled to relief depends on whether he has been prejudiced, a matter that we do not address here.") To demonstrate prejudice with respect to a decision to plead guilty, the second part of the Strickland analysis required Petitioner to show that there is "'a reasonable probability that, but for counsel's errors, [Petitioner] would not have pleaded guilty and would have insisted on going to trial.'" United States v. Couto, 311 F.3d 179, 187 (2d Cir. 2002)(quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

The Supreme Court has noted that the "object of an ineffectiveness claim is not to grade counsel's performance," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Strickland, 466 U.S. at 697. Applying this teaching, the Second Circuit has often rejected ineffectiveness claims by determining that, in view of the strength of the prosecution's case, the defendant is unable to establish prejudice. See, e.g., United States v. Simmons, 923 F.2d 934, 956 (2d Cir. 1991) ("[G]iven the plethora of evidence

against [appellant] there is little reason to believe that alternative counsel would have fared any better."); United States v. Reiter, 897 F.2d 639, 645 (2d Cir. 1990) (although counsel's performance at times fess below professional standards, Sixth Amendment claim fails "given the overwhelming evidence against [the defendant]").

The Advice Of Counsel, If Given as Petitioner Has Alleged, Was Unreasonable

The Petitioner has contended that during his plea colloquy, when the Court advised him that "another possible consequences of your plea here is that you might be deported," the Court's use of the words "possible" and "might" misled the Petitioner, where the Petitioner was actually subject to "automatic" deportation. (Pet. Br. at 7). Further, he has contended that his counsel was ineffective by "remain[ing] silent when the defendant was being misinformed by the presiding judge," and by "mislead[ing] him to believe that by being married to an American and being convicted of a non-violent crime w[ere] all factors that the immigration court would consider in his favor." (Pet. Br. at 7-8).

"When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." Padilla, 2010 WL 1222274, at *8. As did Padilla, Boakye pleaded guilty to a statute which made clear that an admission to it made him "deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Therefore "his deportation was presumptively mandatory" and Fishbein had an obligation to indicate as much to him. Padilla, 2010 WL 1222274, at *8.

Petitioner also argues that Fishbein's silence during his plea proceeding was ineffective assistance. During the proceeding, Magistrate Judge Pitman told Petitioner: "Do you understand that another possible consequence of your plea here is that you might be deported or removed from the United States, and you might be prohibited from ever reentering the United States; do you understand that?" (Exhibit C at 14). Petitioner replied, "Yes, your Honor."

Magistrate Judge Pitman's question is phrased in standard terms addressed to defendants at plea proceedings regardless of their immigration status in the United States. It is not intended to address the consequences of pleading guilty to a specific statute, but rather to make sure that the defendant is aware that there may be immigration consequences to a plea if the relevant statute suggests such consequences. It is clear from the colloquy transcript, in which he asks Petitioner whether or not he is a United States citizen, that Magistrate Judge Pitman is not advising Petitioner of the specific immigration consequences his guilty plea, but rather ensuring that as a general matter Petitioner is aware that there are potential immigration consequences for non-citizens who plead guilty to certain crimes. Magistrate Judge Pitman's question was therefore not an improper phrasing of the law, and Fishbein's silence during the plea proceeding does not inform the decision of whether his assistance to Petitioner overall was ineffective.

If Boakye's allegation as to Fishbein's advice on the immigration consequences of his guilty plea, which

Fishbein disputes,[1] is true, it would amount to unreasonable conduct under Padilla. However, no determination as to the factual dispute over what advice was actually given is necessary because Petitioner does not establish a showing of prejudice as required under the second prong of Strickland.

Prejudice Has Not Been Established

Even if Petitioner has satisfied the first prong of Strickland, he cannot satisfy the second prong of the Strickland test by "affirmatively prov[ing] prejudice." Strickland, 466 U.S. at 693. Even if Petitioner's counsel affirmatively misled him in advance of his guilty plea, Petitioner has established the requisite prejudice to have his conviction vacated. The Petitioner has alleged that had he known that "deportation was automatic . . . [he] would have went to trial." (Pet. Br. at 9). Petitioner has not established any probability that he would actually have insisted on going to trial had he known of the precise immigration consequences of his conviction.

[1] According to Fishbein, he never made the statements Petitioner claims he made but rather "at all times described the crime charged as an aggravated felony which would lead to Petitioner's deportation." (Fishbein Decl. ¶ 3). Because this factual dispute is not dispositive of the motion, it does not require resolution.

Petitioner's own memorandum in support of his motion has acknowledged the evidence that supports his convictions. Petitioner's memorandum acknowledges that he "discussed the importation and distribution of narcotics from Ghana" with his co-conspirators (Pet. Br. at 3 (citing PSR ¶ 9)), that he "traveled to Maryland to sell narcotics" after being released from prison in July 2004, that he returned to New York after selling narcotics in Maryland and paid a co-conspirator with "the proceeds from his narcotics transactions" (Pet. Br. at 3 (citing PSR ¶¶ 17-[21])), and that "a series of telephone calls" between August 1, 2004 and August 12, 2004 "evidenced that the defend[a]nt was outside the New York area completing Narcotics transactions" (Pet. Br. at 3 (citing PSR ¶¶ 3032, 35)). Had the Petitioner proceeded to trial, he would have faced the extensive evidence of his guilt catalogued in his own memorandum and in the PSR, including recordings of incriminating phone calls the Petitioner placed while incarcerated (PSR ¶¶ 8-14), and recordings of additional incriminating calls made after the Petitioner was released from prison pursuant to a Title III wiretap (PSR ¶¶ 15-38).

In addition to facing a strong Government case against him at trial, Petitioner also would have lost the substantial benefit resulting from his plea. Pursuant to the Guidelines, without receiving the three-point reduction for acceptance of responsibility Petitioner earned by pleading guilty, his Offense Level would have been 32. In criminal history category III, Petitioner would have faced a Guidelines range of 151 to 188 months' imprisonment. By pleading guilty and accepting responsibility, Petitioner reduced his Adjusted Offense Level to 29, for a Guidelines range of 120 to 135 months' imprisonment (after accounting for the statutory mandatory minimum sentence of 120 months), and was sentenced to 120 months' imprisonment.

Further, the correspondence in this case contradicts Petitioner's claims. In a letter dated November 6, 2006, Petitioner's counsel at that time, Tipograph, wrote in advance of sentencing that "Mr. Boakye will most certainly be deported upon completion of any sentence. He will not contest any deportation and looks forward to returning to Ghana as quickly as possible." And according to Fishbein, Petitioner never "raise[d] his need to remain in the United States as the dispositive issue in

his decision to plead guilty or go to trial." (Fishbein Decl. ¶ 3).

Petitioner offers no evidence that he would have insisted going to trial. The conclusory claim in Petitioner's brief that he would have gone to trial but for counsel's alleged ineffectiveness, standing alone, does not establish prejudice under Strickland. See Scott v. Superintendent, Mid-Orange Correction Facility, No. 03 Civ. 6383, 2006 WL 3095760 at *9 (E.D.N.Y. Oct. 31, 2006) ("[C]onclusory allegations that a defendant would have insisted on proceeding to trial are generally insufficient to establish actual prejudice under Strickland."); Herrera v. Hynes, No. 08 Civ. 1651, 2008 WL 5068608 at *3 (E.D.N.Y. Nov. 21, 2008)(in the absence of "evidence showing why [petitioner] would have risked a trial when the likely outcome was both exposure to deportation and a substantial, preceding custody term. . . . [petitioner] cannot raise a claim of prejudice under the second prong of Strickland") Zhang v. United States, 543 F. Supp.2d, 175, 185 ("Even if Zhang had been informed that a conviction for an aggravated felony would result in mandatory deportation, there is no evidence that he would have chosen to proceed to trial.")

Accordingly, Petitioner has not shown that there is "a reasonable probability that, but for counsel's errors, [Petitioner] would not have pleaded guilty and would have insisted on going to trial," Couto, 311 F.3d at 187, and thus Petitioner has not satisfied the second prong of the Strickland test.

An Evidentiary Hearing Is Not Required

To obtain an evidentiary hearing, Petitioner must establish that he has a "'plausible' claim," United States v. Tarricone, 996 F.2d 1414, 1418 (2d Cir. 1993), and must set forth in an affidavit specific facts supported by competent evidence, raising detailed and controverted issues of fact which, if proved at a hearing, would entitle him to relief. See Machibroda v. United States, 368 U.S. 487, 494-95 (1962); Newfield v. United States, 565 F.2d 203, 207 (2d Cir. 1977). Where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," no hearing is required under Section 2255. 28 U.S.C. § 2255. In particular, the Second Circuit has made clear that no hearing is required where (1) the allegations of the motion, accepted as true, would not entitle the petitioner to relief; or (2) the

documentary record renders a testimonial hearing unnecessary. Chang v. United States, 250 F.3d 79, 85-86 (2d Cir. 2001).

Further, to the extent Petitioner has alleged any facts outside the record, the Second Circuit has recognized that in habeas cases "'allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner.'" Chang, 250 F.3d at 86. In Chang, the defendant submitted a "highly self-serving" affidavit. In affirming the District Court's denial of the defendant's habeas petition without an evidentiary hearing, the Second Circuit held that:

> It was, therefore within the district court's discretion to choose a middle road that voided the delay, the needless expenditures of judicial resources, the burden on trial counsel and the government, and perhaps the encouragement of other prisoners to make similar baseless claims that would have resulted from a testimonial hearing. The district court reasonably decided that the testimony of Change and his trial counsel would add little or nothing to the written submissions.

Id. at 86. See also Puglisi v. United States, 586 F.3d 209, 214-17 (2d Cir. 2009).

Here, Petitioner has submitted a petition and memorandum that contains only blanket statements and few specific facts. The only disputed issues of fact identified by Petitioner's conclusory memorandum are contradicted by the record and Fishbein's Declaration dated November 19, 2009, and fail to satisfy one or both prongs of Strickland. As a consequence, Petitioner has identified no real disputed issues of fact supported by competent evidence, which, if proved at a hearing, would entitle Petitioner to relief.

Accordingly, no evidentiary hearing is necessary.

Conclusion

Based upon the facts and conclusions set forth above, the motion of the Petitioner under Section 2255 is dismissed with prejudice.

So ordered.

New York, NY
April 21, 2010

ROBERT W. SWEET
U.S.D.J.